



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

December 14, 2007

Ms. Kimberly D. Bose
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Hydrokinetic Conditioned License Policy [Docket No. PL08-1-000]

Dear Ms. Bose,

The National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) and National Ocean Service (NOS) are providing comments on the Federal Energy Regulatory Commission (FERC) *Policy Statement on Conditioned Licenses for Hydrokinetic Projects*. As noted in the policy statement, FERC has engaged in a number of efforts over the past year to speed the development of hydrokinetic energy, which involves the pursuit of new technologies in new operating environments and represents a potentially important future source of clean power. NOAA shares FERC's interest in advancing renewable ocean energy and is committed to working with FERC, other Federal agencies, industry and the public to effectively address the nation's energy needs.

NOAA incorporates by reference our earlier hydrokinetic-related comments on FERC's notice of inquiry and preliminary permit policy [*Docket No. RM07-08-000*], and FERC's proposed pilot project licensing process [*Docket No. AD07-14-000*]. As stated in those documents, we remain supportive of increasing regulatory certainty and assuring environmental protection in light of the limited technological and ecological information available. Based on FERC's aforementioned actions and the pending nature of the pilot licensing process, NOAA



questions the need for conditioned licenses. NOAA requests that FERC reconsider the conditioned license policy pending resolution of the concerns identified below. NOAA also recommends that FERC seek authorizing agency consensus regarding the implementation of this policy through interagency discussions.

NOAA believes that the issuance of conditioned licenses prior to completion of all requisite consultations and approvals would foster uncertainty and increase risk for project proponents. FERC is responsible for compliance with all applicable legal mandates for the hydrokinetic activities it is licensing and cannot shift responsibilities to the applicant. The policy is unclear as to how FERC would ensure that other authorizations will be secured once the conditioned license has been issued. NOAA is particularly concerned with regard to how FERC will comply with requirements of the Endangered Species Act (ESA), Federal Power Act (FPA), National Marine Sanctuaries Act (NMSA), Magnuson-Stevens Fishery Conservation and Management Act (MSA), and the National Environmental Policy Act (NEPA). Issuing licenses in incremental stages is inconsistent with FERC's obligations under these and other statutes, and could confuse and frustrate license applicants. Incrementally building the conditions in a license is also antithetical to FERC's goals of shortening the overall regulatory process and providing certainty to potential hydrokinetic licensees and clarity to the public. A more appropriate process would be the issuance of a single final license following the completion of all relevant environmental analyses and consultations. This would protect license applicants from committing significant resources toward anticipated projects that are later found to pose serious problems for living marine resources and habitat.

NOAA has major reservations regarding the issuance of a conditioned license prior to completion of consultation under ESA section 7(a)(2). First, taking an agency action, such as

issuance of a license, prior to the conclusion of all relevant consultation procedures appears inconsistent with FERC's obligation to insure that its proposed action will not jeopardize the continued existence of any listed species, or destroy or adversely modify its critical habitat (*see Thomas v. Peterson, 753 F. 2d 754, 764 (9th Cir. 1985)*). Further, permitting conditioned licensees to take steps to arrange for financing or engage in non-construction preparatory activities, which could include offsite fabrication of the numerous individual generating units characteristic of hydrokinetic technologies, raises concerns under ESA section 7(d). This provision prohibits Federal agencies, as well as permit and license applicants, from making any irretrievable or irreversible commitment of resources that may preclude the ability to formulate or implement changes to the proposed action if needed to avoid jeopardy of listed species or destruction or adverse modification of critical habitat (*see 50 CFR §402.09*). For these reasons it does not appear to be appropriate, when ESA consultation has been or may be initiated, for FERC to issue a license prior to its completion, as indicated by receipt of either a biological opinion or written concurrence that the action is not likely to adversely affect listed species or their critical habitat.

NOAA also questions the policy with respect to implementation of FPA resource-protection provisions. It is fundamental that all major elements of mitigation necessary to protect fishery resources should be determined prior to issuance of a license (*see Confederated Yakima Board of Indian Tribes v. FERC, 746 F.2d 466, 471 (9th Cir. 1984)*). If NOAA or the Department of the Interior (DOI) issues a preliminary fishway prescription under FPA section 18 or a preliminary condition under FPA section 4(e) for a particular hydrokinetic project, this could trigger adjudicative proceedings under the Energy Policy Act of 2005. Where such a trial-type-hearing proceeding has been requested, it would be inappropriate for FERC to issue a license prior to

completion of the proceeding and formulation of the relevant Secretary's modified prescription or condition. In addition, FERC should clarify that agency recommendations submitted pursuant to FPA sections 10(a) and 10(j) will be given the same weight and process as is required under ordinary licensing procedures.

NOAA also has concerns this policy may impact FERC's ability to comply with consultative obligations under NMSA section 304(d), which requires Federal agencies to consult with NOAA on any proposed action, including private activities authorized by licenses, leases or permits, that is likely to destroy, cause the loss of, or injure any sanctuary resource. If NOAA finds that the proposed action is likely to affect sanctuary resources, we are required to recommend reasonable and prudent alternatives for the Federal agency to implement to protect sanctuary resources. These recommendations can include, but are not limited to, conditions on any FERC license issued for a project. Section 304(d) consultation must be concluded prior to final agency action, in this case, issuance of a conditioned license. In the event FERC does not incorporate an alternative recommended by NOAA and the issuance of the license results in the injury or loss of sanctuary resources, FERC has the obligation to promptly prevent and mitigate the damage to sanctuary resources and restore or replace the resources in a manner approved by NOAA. FERC should ensure this policy will not permit a conditioned license to be issued until any section 304(d) consultations it is required to conduct have been completed with NOAA.

NOAA has similar concerns regarding issuance of a conditioned license prior to completion of consultation under MSA section 305(b), which requires that FERC consult with NOAA on any action that may adversely affect essential fish habitat (EFH). Implementing regulations (*50 CFR §600.920*) specify how long before a final decision, depending on the nature of the action, a Federal agency must submit its EFH Assessment to NOAA. NOAA will respond with EFH

Conservation Recommendations, if appropriate. It is then the responsibility of the Federal action agency to provide a detailed response in writing to NOAA at least 10 days prior to final approval of the action, if the response is inconsistent with NOAA's EFH Conservation Recommendations. FERC should ensure this policy will not permit a conditioned FERC license to be issued until all EFH consultation requirements have been completed with NOAA.

The conditioned license policy does not clearly detail how FERC will meet its environmental assessment responsibilities under NEPA. Several NEPA-related aspects of the policy require clarification, including:

- clear articulation of the scope of the NEPA analysis FERC plans to undertake prior to issuance of a conditioned license, particularly with regard to construction and other activities with potentially adverse environmental impacts;
- specifying the circumstances under which FERC would consider it “*appropriate*” to issue a conditioned license;
- identification of when a full NEPA analysis, sufficient to facilitate consultation, would be completed; and
- identification of the point in the process at which alternatives to the action, as well as associated possible mitigation measures, would be considered and their impacts assessed.

Finally, FERC needs to clarify how it would determine to incorporate, “*as appropriate,*” authorization terms and conditions into revisions of conditioned licenses, particularly with regard to non-discretionary provisions.

Based on the concerns we have identified, NOAA strongly recommends FERC reconsider the conditioned license policy. NOAA encourages FERC to pursue further interagency dialogue,

and looks forward to working with FERC and DOI in advancing environmentally-sound renewable ocean energy development and production. Please contact Thomas Bigford, Chief, Habitat Protection Division, NMFS Office of Habitat Conservation at (301) 713-4300 x131, or David Kaiser, Senior Policy Analyst, NOS Office of Ocean and Coastal Resource Management at (603) 862-2719, if you have questions or require additional information.

Sincerely,



Samuel D. Rauch III
Deputy Assistant Administrator for
Regulatory Programs, NMFS



William Corso
Deputy Assistant Administrator, NOS